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Nos. 74-165, 74-166, 74-167, and 74-168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

REGIONAL RAIL REORGANIZATION ACT CASES

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF FOR COMMONWEALTH OF PENNSYLVANIA AMICUS CURIAE

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BRIEF FOR COMMONWEALTH OF PENNSYLVANIA AMICUS CURIAE

INTEREST OF PENNSYLVANIA

This brief Amicus Curiae is sponsored by the Attorney General of Pennsylvania on behalf of the Commonwealth of Pennsylvania. Probable jurisdiction was noted on October 9, 1974.

The position of Pennsylvania is that the judgment below should be affirmed in part, and reversed in part. Section 304(f) of Regional Rail Reorganization Act of 1973 ("Act"), which prohibits abandonments of line and discontinuances of service for a limited period, is constitutional, and the judgment below should be reversed to that extent; however,

Section 207(b) of the Act, which sets forth the process by which a railroad will come under the Act upon pain of dismissal of the reorganization proceeding, is unconstitutional, and the judgment below should be affirmed on this ground, but reversed to the extent Section 207(b) is not void in its entirety.

We support the injunction against certification of a Final System Plan. The Act should be returned to Congress for appropriate revisions, or for an entirely different approach.

The Governor of Pennsylvania, Hon. Milton J. Shapp, was an active participant in the legislative forum during consideration of the Act by the Congress. The Act is viewed as "Phase II" of the Penn Central merger disaster.[1]

The Attorney General of Pennsylvania participated in all of the so-called "120-day" and "180-day" decisions under Section 207(b) of the Act, with the exception of the proceeding involving the Ann Arbor Railroad Company.[2] Pennsylvania was an appellee before the Special Court, in support of the determination of various reorganization

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[1] Hearings on S. 1031, S. 2188 & H.R. 9142, *Northeastern and Midwestern Railroad Transportation Crisis*, before Surface Transportation Subcommittee of the Committee on Commerce, U.S. Senate, 93rd Cong., 1st Sess., Ser. No. 93-8, at pp. 161-204 and 832-44 (1973).

[2] Penn Central Transportation Co., Lehigh Valley, Reading, Central R.R. Co. of New Jersey, Lehigh & Hudson River, Erie Lackawanna, and Boston & Maine. Some of these decisions have been reported. *In Re Lehigh and Hudson River Railway Company*, 374 F. Supp. 4 and 377 F. Supp. 475 (S.D. N.Y.); *In Re Boston & Maine Corporation*, 378 F. Supp. 68 (D. Mass.); *In Re Reading Company*, 378 F. Supp. 474 and 378 F. Supp. 481 (E.D. Pa.).

courts not to be reorganized under the new Act,[3] and was an appellant before the Special Court seeking to reverse the decision of the Reading court that Reading Company be reorganized under the Act.[4]

The Danger of Conrail

These appeals are largely concerned with whether a Tucker Act[5] remedy is available to enable the U.S. Court of Claims to enter a deficiency judgment against the United States of America for any interim erosion, or for a taking of property by way of conveyance pursuant to a final system plan.

This issue arises primarily, in our judgment, because of the general consensus among transportation experts that Conrail will not prove economically viable. The evidence before the various reorganization courts is summarized in the opinion of the Special Court,[6] where the court found –

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[3] Penn Central, Lehigh Valley, Central R.R. Co. of New Jersey, and Lehigh & Hudson River.

[4] There were at least two reorganization courts that issued "120-day" orders without a formal proceeding. One of these is the Cadillac & Lake City Railroad, mentioned in Judge Friendly's opinion for the Special Court, at p. 7, fn. 9. The other is *New Hope & Ivyland Railroad Company* (Bank. No. 70-324, E.D. Pa.), where District Judge Luongo on May 2, 1974, entered an order under the first sentence of Section 207(b) finding the railroad reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act and that the public interest would be better served by continuing the present reorganization proceedings rather than by a reorganization under the Act.

[5] 28 U.S.C. 1491.

[6] Special Court, opinion of Sept. 30, 1974, at pp. 57-83.

> "Conrail's prospects to be sufficiently doubtful that . . . we would not find the processes of the Act to be fair and equitable, absent a Tucker Act remedy." (p. 69)
>
> "The upshot is that the investors cast sufficient doubts on Conrail's prospects that it would be unfair and inequitable to remit them solely to the inadequate remedies provided in Section 303(c)(2)." (p. 83)

Pennsylvania is concerned with the viability of Conrail in the context of adequate railroad service to meet the needs of the citizens and businesses of the State. We concur in the doubts concerning Conrail's viability. Since the shipping and traveling public would not have a remedy, it is our suggestion that the Act be returned to Congress, *now*, so that injury may be avoided.[7]

Events Leading to Enactment

Regional Rail Reorganization Act of 1973 – with the creation of Conrail – is the direct result of the disastrous merger of the former Pennsylvania Railroad Company (PRR) with the former New York Central Railroad Company (NYC), which was consummated February 1, 1968.[8] The PRR had paid dividends in every year until its merger. The NYC likewise had an excellent financial history. Neither railroad had ever been in reorganization until, once merged on February 1, 1968, the behomoth went bankrupt two years later in June, 1970.

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[7] See testimony of Governor Shapp, fn. 1, *supra*.

[8] See: *B & O R. Co. v. United States*, 386 U.S. 372 (1967) and *Penn-Central Merger Cases*, 389 U.S. 486 (1968).

The rationale underlying the Penn-Central merger was that railroad traffic would dramatically decrease, such that merger would bring railroad plant in line with available railroad business. The I.C.C. adopted important findings of its hearing examiners in approving the merger. *Pennsylvania R. Co.-Merger-New York Central R. Co.*, 327 I.C.C. 475, 481-82 (1966):

> "Continuously declining traffic levels over the past years have resulted in a reduction in plant for both applicants. Their application to merge is another step in that direction and which applicants have shown will be fruitful of operating economies in the long run." 327 I.C.C. at 681.
>
> "From a traffic and revenue standpoint, every evidentiary factor indicates a longrun decline broken only by normal cyclical variations and under existing circumstances, no prudent justification exists for expecting a radical recovery from this long-range trend." 327 I.C.C. at 911.
>
> "Rail output will continue to fluctuate around the 600 billion ton-mile mark with approximate upper and lower limits of 650-660 and 550-560.
>
> "Eastern District roads and the NYC-PRR specifically will face a continued decline in output.
>
> "In light of the long-term growth of real output, the increasing transportation demand of the economy will be supplied by modes, public and private, other than rail." 327 I.C.C. at 739.

In actual fact – as is now well known – Penn Central traffic at the time of entry into reorganization was about 40 percent higher than projected.[9]

The asserted need to reduce the railroad plant – which proved so disastrous and so incorrect in the case of the Penn Central merger – is now claimed as the rationale to create an even greater merger.

The push for legislation began in early 1973. The Penn Central trustees, in reports issued January 1 and February 1, 1973, advised the reorganization court that –

> "without governmental financial assistance for improvement of the railroad, a reorganization of Penn Central cannot be achieved in 1976, as they had considered possible."

Shortly thereafter, on February 8, a one-day work stoppage occurred throughout Penn Central's system. It was charged that there was no labor issues, and that the dispute was merely a vehicle to get to the Congress.[10] In any event, Congress enacted P.L. 93-5, 87 Stat. 5, within hours. The legislation placed a 90-day moratorium on the so-called labor strike, and required the U.S. Secretary of Transportation to submit a report by March 26 which –

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[9] Class I rail output in 1973 amounted to 852 billion ton-miles. Yearbook of Railroad Facts (1974 Ed.), Assn. of American Railroads, at p. 29.

[10] See: Hearings on S.J. Res. 59, *Penn Central Railroad Dispute – February 1973*, before U.S. Senate Committee on Labor & Public Welfare, 93rd Cong. 1st Sess., 31 (1973); Hearings on H.J. Res. 331, *Penn Central Railroad Crew Consist Labor-Management Dispute*, before U.S. House Committee on Interstate & Foreign Commerce, 93rd Cong., 1st. Sess., Ser. No. 93-2, at 13 (1973). See also: Senate Report No. 93-18, *Consideration of Legislation for Temporary Settlement of Railroad-Labor Dispute.*

> ". . . provides a full and comprehensive plan for the preservation of essential rail transportation services in the Northeast section of the Nation, including the President's proposals, if any, regarding federal financial expenditures necessary for restoration or preservation of essential transportation services imperiled by the financial failure of rail carriers. . . ."

The legislation also provided that during the 90-day period no change could be made by the court in the conditions out of which the dispute arose.

The Penn Central reorganization court on March 6, 1973, *sua sponte*, stated it was highly doubtful that Penn Central could properly be continued to operate beyond October 1, 1973. A hearing was set for July 2, 1973, for the trustees to present a feasible plan for reorganization or proposals for liquidation. *In Re Penn Central Transportation Company*, 355 F. Supp. 1343 (E.D. Pa.).

The Penn Central trustees on July 2, submitted a plan of liquidation as their plan of reorganization. After extensive hearings by I.C.C., the agency determined the trustees' plan not to be a plan of reorganization within the meaning of Section 77 of the Bankruptcy Act, and rendered a comprehensive report to this effect on September 30, 1973. *Penn Central Reorganization*, 347 I.C.C. 45.

Thereafter, attention shifted to the legislative scene. The approach taken by the Senate Committee on Commerce was to provide interim financial assistance to the railroads in reorganization during a planning period by the I.C.C., Department of Transportation, and the Congress. Under the principal Senate proposal, S. 2188, the implementing legislation for the actual restructuring of the railroad network would not be finalized until after the planning process

was completed.[11] On the other hand, the House Committee on Interstate & Foreign Commerce desired immediate enactment of the restructuring legislation, even prior to the commencement of the planning process. No hearings were held by the House Committee on the H.R. 9142, although hearings had been held on other proposed legislation for the Northeast railroads. The bill H.R. 9142 was reported November 3, 1973 by the House committee, and it passed the House on November 8, 1973.

Hearings were then held by the Senate Committee in late November on H.R. 9142 and S. 2188. A revised version of H.R. 9142 (S. 2767) was reported December 13. The Conference report was agreed to in late December, and the measure signed by the President on January 2, 1974.

Judicial Proceedings under the Rail Act

The proceedings held by the various reorganization courts under section 207(b) of the Act, with the exception of the Ann Arbor and Reading, resulted in decisions by the reorganization courts not to be reorganized under the new Act.

The Government did not appeal the Erie Lackawanna and Boston & Maine decisions to the Special Court. These two roads connect with the Delaware & Hudson Railway Company ("D&H") to provide a through route between Chicago, Ill. and Portland, Me. See: *Norfolk & W. Ry. Co. and New York, Chicago & St. Louis*, 330 I.C.C. 780 (1967), sustained in *Penn-Central Merger Cases*, 389 U.S.

[11] See: S. Rept. 93-365 (Report on S. 2188); S. Rept. 93-302 (Report on S. 1925); and S. Rept. 93-344 (Report on S. 2060).

486 (1968). The D&H is not in reorganization. It is a subsidiary of Norfolk & Western Railway Company.

On the other hand, the Government did appeal the decisions of the Penn Central, Lehigh Valley, Central R.R. Co. of New Jersey and Lehigh & Hudson River reorganization courts to the Special Court.

Commonwealth of Pennsylvania was an appellee in the Special Court proceedings, except with respect to the Reading decision.[12]

Earlier, Pennsylvania had appealed various of the "120-day" decisions, entered about May 2, 1974, to the Special Court.[13] The Special Court declined to consolidate the appeals from the "120-day" decisions with the forthcoming "180-day" decisions to be rendered by the reorganization courts on or about July 1, 1974. In fact, the Special Court dismissed the "120-day" appeals for lack of jurisdiction. The Special Court's opinion of May 24, 1974 is set forth in the appendix to this amicus brief.[14] One effect of

[12] Pennsylvania was not a party to the Ann Arbor proceeding.

[13] The New Haven Trustee also appealed the "120-day" decision to the Special Court.

[14] Penn Central's trustees, on April 3, 1974, publicly announced their view to their reorganization court that the Act did not provide a process which would be fair and equitable. The Special Court on April 26 adopted rules requiring an appellant to the forthcoming reorganization court order under the first sentence of section 207(b), anticipated about May 2, to show cause why the appeal should not be dismissed for lack of jurisdiction. See: *Rules of the Special Court under Section 209 of Regional Rail Reorganization Act of 1973*, preceding vol. 374 of Federal Supplement.

the Special Court's procedural ruling was to place primary emphasis upon whether the process of the act is "fair and equitable" to creditors and investors, rather than upon the public interest question.[15]

Commonwealth of Pennsylvania appealed the "120-day" decisions to the U.S. Court of Appeals for the Third Circuit[16] and to the Second Circuit.[17] A panel of the Third Circuit heard argument on July 18, 1974, but has determined not to decide the appeals until after a decision from the U.S. Supreme Court in this case.[18] Similarly, Commonwealth of Pennsylvania appealed the "180-day" decisions

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15 The ultimate decision of the Special Court was to reverse the order of the reorganization courts that the Act does not provide a process which would be fair and equitable to the estate of the railroad. (Opinion, p. 116-17).

16 Nos. 74-1556/8 and 74-1589. The appeals were heard with that taken by the New Haven Trustee, No. 74-1501.

17 No. 74-1684. The Lehigh & Hudson River Ry. is undergoing reorganization in the U.S. District Court for the Southern District of New York.

18 Letter from Clerk of Court to all counsel, dated July 22, 1974. Pennsylvania's subsequent efforts to secure a ruling from the Third Circuit have been unavailing. The situation is reminiscent of a similar occurrence during judicial review of the Penn Central merger, where a suit attacking the basic validity of the merger and inclusion had been stayed by a three-judge district court at a time when the railroad interests and the Government (but not the record), were before the U.S. Supreme Court. *Penn-Central Merger Cases*, 389 U.S. 486, 502-7, 527-28, 528-48 (1968). See the description given by the General Attorney for Penn Central. Helmetag, Carl, *Railroad Mergers*, 54 Va. L. Rev. 1493, 1521 and fn. 164 (1968).

under the second sentence of section 207(b) to the respective U.S. Court of Appeals.[19] The appeals involve the constitutionality of section 207(b) as applied to various railroads.

Decision of the Special Court

The Special Court reversed all of the decisions of the reorganization courts, except those of the Ann Arbor and Reading Courts, and, of course, its reversal did not affect the two railroads, Erie-Lackawanna and Boston & Maine, whose reorganization court decisions the Government had elected not to appeal.

Although Pennsylvania's notices of appeal from the "120-day" orders had been dismissed by the Special Court for lack of jurisdiction, and although Pennsylvania did not appeal the "180-day" decisions to the Special Court, except for Reading, the Special Court nevertheless proceeded as if Pennsylvania had appealed certain constitutional issues to the Special Court.[20]

Concerning the first portion of the first sentence of section 207(b), the Special Court concluded that there was no substantial difference with the "undue delay" of section 77(g) of the Bankruptcy Act. (Opinion, Thomsen, p. 4):

> "Finally, we find no substantial difference between the standard used in section 207(b) – 'reorganizable on an income basis within a reasonable time under section 77' – and the standard – 'undue delay' – used in section 77(g)".

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19 Nos. 74-1686/9 (3rd Cir.); 74-2018 (2d Cir.).

20 Opinion, Thomsen, pp. 1-4, 7-8, 12, 15.

With respect to the "public interest", mentioned in the second portion of the first sentence of section 207(b), the Special Court in the opinion by Judge Friendly, stated that except for the Penn Central Secondary Debtors, there was no occasion for the reorganization courts to consider whether reorganization under Section 77 of the Bankruptcy Act would better serve the public interest. (Opinion, Friendly, p. 28) On the other hand, Judge Thomsen for the Special Court concluded that the public interest would be better served by reorganization under the Act. (Opinion, Thomsen, pp. 3-4; 15)

The Connecticut General Decision

The proceedings below involved attacks upon the constitutionality of the Act by creditors and shareholders of Penn Central.

The three-judge court ruled that section 304(f), which prevents interim abandonments without approval by the United States Railway Association, is null and void to the extent it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of a railroad. (J.A., pp. 82-83).

The court also ruled that section 207(b) is unconstitutional to the extent it requires reorganization courts to dismiss proceedings under section 77 of the Bankruptcy Act. (J.A., p. 83).

We point out that the threat of the *in terrorem* dismissal of the proceedings, in our judgment, resulted in a limited participation by public bodies in the "120-day" and "180-day" proceedings. The only public bodies in the Penn Central proceedings, and before the Special

Court, were the States of New Jersey and Pennsylvania and the City of Pittsburgh.[21]

ARGUMENT

Of the many questions presented by these appeals, this brief is primarily concerned with two issues. These are (1) whether Section 304(f) of the Act is null and void by requiring continued rail operations at a loss and, (2) whether section 207(b) is void in its entirety. Section 304(f), 45 U.S.C. 744(f), is set forth in the Joint Appendix (J.A., p. 418), as is section 207(b), 45 U.S.C. 717(b). (J.A., p. 406).

We urge that Section 304(f) is constitutional, but that section 207(b) is unconstitutional in its entirety.

The transmission of the final system plan should be enjoined, and the Act returned to the Congress.

I. A RAILROAD IN REORGANIZATION MAY BE REQUIRED TO SUFFER LOSSES DURING A NECESSARY PERIOD PENDING SUCH REORGANIZATION.

We do not believe an extended argument is necessary concerning the proposition that a railroad in reorganization can be required to operate some facilities at a loss for a reasonable period pending reorganization. Section 304(f) of the Act is addressed to an "interim abandonment". The recent decisions of this court in *Penn-Central Merger Cases*, 389 U.S. 486, 510-11 (1968) and *New Haven Inclusion Cases*, 399 U.S. 392, 492 (1970), sustain the proposition

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[21] The States of Wisconsin and Michigan participated only in the Ann Arbor appeal. New York's Dept. of Transportation filed an amicus brief in the Special Court.

that the public interest can require a deficit operation pending reorganization. The brief of appellant, United States Railway Association, appears adequate on this score.[22]

The three-judge district court erred in finding section 304(f) unconstitutional in any respect. The "freeze" on railroad abandonments, during the planning process of the United States Railway Association, is similar to the moratorium on passenger train discontinuances during the planning period by the U.S. Department of Transportation under Rail Passenger Service Act of 1970. 45 U.S.C. 642. *Baker v. Pennsylvania,* 400 U.S. 875 and 401 U.S. 902 (1971).

II. SECTION 207(b) SHOULD BE HELD VOID IN ITS ENTIRETY.

The three-judge court ruled that section 207(b) is unconstitutional on the ground that it violates the uniformity requirement of the Bankruptcy clause, in that it directs the reorganization court to dismiss the proceeding in the event the debtor is found not to be reorganizable *on an income basis* within a reasonable time under section 77 of the Bankruptcy Act. (J.A., pp. 61-65, 82-83). The majority went beyond the uniformity issue to suggest (J.A., p. 65):

> "Indeed it seems probable that the same portion of section 207(b) is vulnerable on due process and equal protection grounds, and perhaps on the ground of separation of powers as well."

We agree that section 207(b)'s dismissal provision is unconstitutional, and the three-judge court should be affirmed

[22] No. 74-167 at pp. 82-97.

in this regard. However, we urge the court below erred in not going further to declare section 207(b) void in its entirety.

Due Process. The Penn Central reorganization has been governed by section 77 of the Bankruptcy Act. Pennsylvania has claims against Penn Central, and Pennsylvania has a strong interest in adequate railroad transportation.

A section 77 proceeding can be dismissed only after a finding of "undue delay", and prior consultation with the Interstate Commerce Commission, as set forth in section 77(g). The dismissal of a section 77 case heretofore has been considered as a last resort.

The new Act says that a section 77 proceeding should be dismissed if the process of the new act would be unfair and inequitable to the Estate. However, even if the process is fair and equitable, section 207(b) requires reorganization under the new Act, transfer of property to Conrail, and the summary abandonment of lines not included in the Final System Plan, if the railroad is not "reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under the new Act."

It clearly violates the due process clauses to cut-off substantial rights of Commonwealth of Pennsylvania, and the interest of its citizens and businesses in opposition to abandonments, in the manner chosen by the Congress.

The Special Court attempted a cure by interpreting the phrase "reorganizable on an income basis within a reasonable time under section 77" to mean the same as "undue

delay" under section 77(g), thus warranting dismissal of the proceeding. (Opinion, Thomsen, p. 4)

There is no basis for such a comparison. Dismissal under section 77(g) requires prior consultation with the Interstate Commerce Commission, and usually a report by the I.C.C. See: *New York, O. & W. Ry. Co. Reorganization*, 295 I.C.C. 346 (1956).

The phrase "reorganizable on an income basis within a reasonable time under section 77" is not the same as "undue delay" under section 77(g). It derives from the language of *In Re Third Avenue Transit Corp.*, 198 F.2d 703, 706 (2d Cir. 1952) –

> "That the debtor can be reorganized in accordance with the Act, within a reasonable time."

The standards of *Third Avenue Transit* do not relate to dismissal of a reorganization proceeding, but are the standards for issuance of trustees' certificates for operating expenses which would supersede existing mortgage liens. The *Third Avenue Transit* test has been used frequently in the Penn Central reorganization cases. See: *In Re Penn Central Transp. Co.*, 474 F.2d 832, 835-6 (3rd Cir. 1973); 484 F.2d 323 (3rd Cir. 1973), cert. den. 414 U.S. 1079 (1974); 494 F.2d 270 (3rd Cir. 1974), cert. den. ____ U.S. ____ (10/15/74).

It may very well be the case that a railroad does not have a likelihood of reorganization within a reasonable time, yet it would be premature to dismiss the proceeding. Moreover, the requirement of an "income basis" reorganization is not contained in section 77, and a railroad's operations could be reorganized by merger or inclusion in another system, as suggested by the majority below. (J.A., pp. 64-65)

Section 207(b) has caused a radical revision in an ongoing section 77 proceedings to the prejudice of Pennsylvania. The wording of section 207(b) is simply not the equivalent to the "undue delay" governing dismissal of the proceedings under section 77(g), and it is not requisite that a reorganization be on an "income basis".

Separation of Powers. Congress cannot delegate the overall broad "public interest" directly to the reorganization court. The various reorganization courts attempted to avoid the issue on the ground that the railroad was not reorganizable on an income basis within a reasonable time under section 77. Of course, where a doubt of constitutionality exists, a construction which is fairly possible will be attempted so as to avoid the question. *United States v. Delaware & H. Co.*, 213 U.S. 366 (1908); *United States v. Congress of Industrial Organizations*, 355 U.S. 106 (1948). However, such a construction cannot do violence to the Act.

Here, reading the "public interest" out of section 207 (b) is directly contrary to the intent of Congress. The I.C.C.'s guideline in approving a plan of reorganization is the "public interest" as stated in section 77(d).[23]

Moreover, because the term "and" is used between the two portions of the first sentence of section 207(b), the presumption is for the conjunctive sense, unless the legislative intent is clearly to the contrary. Sutherland (4th Ed.), Section 21.14, fn. 2. We suggest the "reorganizability" and "public interest" provisos must be read together and balanced against each other. In a somewhat analogous

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[23] Judge Thomsen, for the Special Court, made express findings on the public interest. (Opinion, Thomsen, pp. 3-4, 15).

situation, in proceedings under section 13a of the Interstate Commerce Act, 49 U.S.C. 13a, the "undue burden" and "public convenience and necessity" findings were balanced rather than entered separately. See: *Illinois Commerce Commission v. United States*, 320 F. Supp. 205, 208-9 (E.D. Ill. 1970); *Southern R. Co. v. North Carolina*, 376 U.S. 93, 101-5 (1964); Bard, Robert L., *Rail Passenger Service*, 34 U. of Chi. L. Rev. 301, 319-23 (1967). Cf. *Public of State of Indiana v. United States*, 325 F. Supp. 1223, 1226 (N.D. Ind. 1971).

The Conference Report clearly adopted the conjunctive interpretation of the "reorganizability" and "public interest" features in section 207(b). H. Rept. No. 93-744, at p. 52:

> "The conference substitute provides that, within 120 days after the date of enactment, the reorganization or other court must decide whether a railroad in reorganization is reorganized on an income basis within a reasonable period of time and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this bill. If the court decides that a railroad is not so reorganizable, the court is then required to order the railroad to proceed with reorganization pursuant to the bill."

This type of "public interest" is a legislative power administered by Congress. This Court stated in a leading case involving a railroad in reorganization that such "public interest" has been entrusted to administrative agencies. *Palmer v. Massachusetts*, 308 U.S. 79, 86 (1939):

> "It has become the settled social policy of both the states and the nation to entrust the type of public interest here in question to expert administrative

> agencies because of "the notion" as Judge Learned Hand pointed out below, "that a judge is not qualified for such duties."

Such traditional and general "public interest" in railroad reorganizations limits the power of the judiciary. The Court stated in *Flast v. Cohen*, 392 U.S. 83, 97 (1968):

> "Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process."

The "public interest" here is a legislative matter, and is not thought of as being capable of resolution through the judicial process. It violates the separation-of-powers concept. *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 590-91 (1949). The cases cited by the Special Court to the contrary are easily distinguishable, and the public interest was not of the broad scope involved here. (Opinion, Friendly, p. 29)

Section 207(b) should be held void in its entirety.

III. THE CERTIFICATION OF THE FINAL SYSTEM PLAN SHOULD BE ENJOINED.

The three-judge court enjoined the United States Railway Association from certifying a final system plan to the Congress. (J.A., p. 82). Pennsylvania concurs in that portion of the judgment. The result would be that the Act be returned to the Congress for revision.

The principal thrust of the brief for the United States Railway Association is the notion that the present railroad difficulties stem in large part from excess capacity, and

that the elimination of such alleged excess capacity – particularly track – is key to railroad reorganization.

The report of the U.S. Secretary of Transportation, issued February 1, 1974 under section 204 of the Act, called for the elimination of apx. 25 percent of the rail network in the region. The report of the Interstate Commerce Commission, issued May 2, 1974 under section 205 (d)(1), was highly critical of this suggested plant reduction.

The scheme underlying the new Act is that a merger of many railroads into a single Conrail will serve the public interest and allow a reduction in capacity. The Penn Central trustees rejected dissolution of the Penn-Central merger because of "additional turmoil" in favor on Conrail:[24]

> "on hindsight, the merger of the Pennsylvania and the New York Central may not have been the best alinement of those roads. However, it is now, after great turmoil from labor, shipper, and management viewpoints, serving as an effective trunkline railroad. We see real disadvantage in dismembering the enterprise with all the additional turmoil that such a dismemberment would entail."

While the premise of the new Act is a contraction of railroad facilities, the very committee reports acknowledge that rail business is at an all-time peak. S. Rept. No. 93-601 at p. 11; H. Rept. No. 93-620, at p. 26.[25]

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[24] See: Testimony of Jervis Langdon in Hearings on H.R. 6591, *Northeast Rail Transportation*, before House Committee on Interstate & Foreign Commerce, Ser. No. 93-30, at 251-52 (1973).

[25] Appendix B to the Special Court's opinion suggests that legislative changes may be under consideration; however, such cannot be assured absent action by this Supreme Court in the instant appeals.

The Act should be returned to the Congress to remedy the obvious inconsistencies and to prevent very real damage to the national economy.[26]

CONCLUSION

The judgment should be affirmed in part and reversed in part, as suggested herein.

Respectfully submitted,

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October, 1974

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[26] We have assumed throughout this brief that this Court has complete freedom of action regarding constitutional questions. See: Opinion of Special Court, Friendly, at p. 35. Moreover, the Judicial Panel on Multidistrict Litigation, after extensive argument and briefing, declined to transfer the constitutional cases to the Special Court. *In Re Litigation Under Reg. Rail Reorganization Act of 1973*, 373 F. Supp. 1404-5 (1974).

APPENDIX

Special Court,
Regional Rail Reorganization Act of 1973

Argued May 23, 1974 Decided May 24, 1974

In the Matter of

PENN CENTRAL TRANSPORTATION COMPANY, **No. 74-3**

Debtor.

In the Matter of

READING COMPANY, **No. 74-5**

Debtor.

In the Matter of

LEHIGH VALLEY RAILROAD COMPANY, **No. 74-4**

Debtor.

In the Matter of

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, **No. 74-2**

Debtor.

In the Matter of

THE LEHIGH AND HUDSON RIVER RAILWAY COMPANY, **No. 74-1**

Debtor.

Before FRIENDLY, Presiding Judge, and McGOWAN and THOMSEN, Judges.

PER CURIAM:

We have before us five appeals from "120-day decisions" under the first sentence of §207(b) of the Regional Rail Reorganization Act of 1973 (the Act). In Docket 74-3 Richard Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company (the New Haven Trustee), a creditor of Penn Central Transportation Company (Penn Central), appeals from an order of Judge Fullam in the District Court for the Eastern District of Pennsylvania finding that Penn Central is not reorganizable on an income basis within a reasonable time under §77 of the Bankruptcy Act. The Commonwealth of Pennsylvania is the appellant in the four other dockets. In the case of the Lehigh Valley, Judge Fullam made a finding similar to that in the Penn Central; so did Judge Ditter, also in the District Court for the Eastern District of Pennsylvania, in the case of Reading Company, and Judge Augelli in the District Court for the District of New Jersey in the case of The Central Railroad Company of New Jersey. In the case of The Lehigh and Hudson River Railway Company, Judge Ward, in the District Court for the Southern District of New York, found that the railroad could not be reorganized on an income basis within a reasonable time and also that the public interest required reorganization under the Act.

Our study of §207(b) made us doubtful whether we had jurisdiction of appeals that might be taken from "120-day" decisions under the first sentence as distinguished from the "180-day" orders (or failure to make orders) under the third and fourth sentences. Our doubt was not bottomed, as thought by the New Haven Trustee, on any belief that our jurisdiction under §207(b) was limited to orders that would constitute "final decisions" under 28

U.S.C. §1291, but rather on scepticism whether Congress could have meant 120-day decisions as well as 180-day orders to be appealable. In the interest of an expeditious determination of this important procedural question, we provided in our Rule 13 that, immediately on the filing of an appeal from a decision under the first sentence of §207(b), the clerk of this court should send a notice requiring the appellant to show cause, at a time and place specified in such notice, why the appeal should not be dismissed for want of jurisdiction. Such notices were duly sent. Having received briefs and heard argument, we now dismiss all such appeals on that ground.

We begin our discussion by owning less than complete ability to understand why Congress required the district courts to act under §207(b) in two steps rather than in one, although the legislative history, hereafter summarized, affords some clue how this came about. The 120-day decision is rendered before the district court has the benefit of the evaluation of the report of the Secretary of Transportation on Rail Service in the Midwest and Northeast Region by the Rail Services Planning Office under §205(d)(1), which it will have available for 60 days before the 180-day decision is required. Moreover, the 120-day decision does not seem to have any immediate legal consequences, at least when it is adverse to reorganization under §77;[1] in such cases these consequences flow rather from the action required to be taken within the 180-day period. Even if there were no other pertinent considerations, we would require much clearer language than that in §207(b) to hold that such a "decision" is appealable.[2] But there are.

One strong indication that Congress did not intend us to review decisions under the first sentence of §207(b)

such as those here in question is furnished by the timetable. Under the penultimate sentence all appeals under §207(b) must be decided within 80 days after the appeal is taken – a most stringent requirement in light of the number of appeals Congress must have thought probable, the difficulty of the issues, and the voluminousness of the records. Yet if decisions under the first sentence against reorganization under §77 were appealable and we should need the full 80 days to decide them, our decisions would not have been rendered by the time the district courts are required to act under the third sentence. Moreover, we cannot imagine that Congress intended to demand that we hear and decide within such onerous time limits two sets of appeals involving many of the same issues. Similar considerations apply with respect to counsel; if decisions under the first sentence against reorganization under §77 were appealable, counsel would have to be writing their briefs to us at the same time they would be involved in further hearings in the district courts.

Our conclusion that 120-day decisions under the first sentence of §207(b) against reorganization under §77 are not appealable is also fortified by the legislative history. The relevant provision in the House bill, §301, reads as follows:

> Sec. 301. *Determination of Status of Railroads in Reorganization.* – Within sixty days after the date of enactment of this Act, each United States district court having jurisdiction over a railroad in reorganization shall make a finding as to whether or not, based on the financial condition of and prospects for such railroad, it can be reorganized on an income basis under section 77 of the Bankruptcy Act. With respect to a railroad which is found not to be reorganizable on

> an income basis under section 77 of the Bankruptcy Act, the court shall enter an order to the effect that such railroad shall be reorganized in accordance with the provisions of this Act and those provisions of such section 77 not inconsistent with this Act, or the court may entertain a motion to dismiss the section 77 proceedings. In any case in which a United States district court does not make the finding referred to in the first sentence of this section with respect to any railroad in reorganization within the sixty-day period referred to in such sentence, such railroad shall be presumed to be a railroad with respect to which there is a reasonable likelihood that it can be reorganized on an income basis under section 77 of the Bankruptcy Act. In the event that a railroad is found not to be reorganizable on an income basis under section 77 of the Bankruptcy Act, the court shall advise the association with respect to its findings under this section. The finding of each district court under the first sentence of this section, or the presumption created under the third sentence of this section, as the case may be, shall be subject to appeal as in the case of an order granting or denying a preliminary injunction pursuant to rule 52 of the Federal Rules of Civil Procedure and section 1292 of title 28 of the United States Code and any such appeal proceedings shall be concluded on an expedited basis.

See H.R. Rep. No. 93-620, 93rd Cong. 1st Sess., p. 4. Clearly this provided only for one appeal, not for two,[3] although the appeal would be to the appropriate court of appeals and not to a special court, which, under §501,

came into existence at a much later date, after the adoption of the preliminary system plan.

The Senate took an entirely different course concerning the time for district courts to decide whether reorganization should be under §77 or under the Act. The Railway Association was evidently to proceed initially on the assumption that all the bankrupt railroads in the Northeast would come under the plan. Then §207(b) provided:

> (b) *Approval.* – Within 90 days after the adoption and release by the Association of the preliminary system plan pursuant to subsection (a) of this section, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that reorganization be proceeded with pursuant to this Act unless it finds (1) that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) that reorganization under this Act is not possible on terms which would be fair and equitable to the estate of the railroad in reorganization. An appeal from an order made under this section may be made only to the special court. Appeal to the special court shall be taken within 10

> days following entry of an order pursuant to this subsection, and the special court shall complete its review and render its decision within 20 days after such appeal is taken. There shall be no review of the decision of the special court.

S. Rep. No. 93-601, 93rd Cong. 1st Sess., pp. 70-71. Under the Senate bill there was again to be only one district court decision, although at a date much later than under the House bill, and consequently only one appeal – here to the special court.

Section 207(b) as enacted was evolved in conference. The relevant provision of the Conference Report, H.R. Rep. No. 93-744, 93rd Cong. 1st Sess., p. 52, was as follows:

> (4) the timing for decisions by the reorganization or other courts with regard to whether a railroad is reorganizable on an income basis or whether the "this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization" has been modified. The conference substitute provides that, within 120 days after date of enactment, the reorganization or other court must decide whether a railroad in reorganization is reorganizable on an income basis within a reasonable period of time and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this bill. If the court decides that a railroad is not so reorganizable, the court is then required to order the railroad to proceed with reorganization pursuant to the bill. This court determination is to be submitted

within 60 days after the Office submits its study and evaluation of the Secretary's report on rail services in the region (180 days after the date of enactment), unless the court finds that the legislation does not provide a process which would be fair and equitable to the estate of the railroad in reorganization. If the court makes such a finding it is directed to dismiss the reorganization (or other) proceedings. Under the House bill the decision to proceed with reorganization under this legislation was to be made within 60 days after enactment in order to give the planners as much advance notice as possible as to those railroad properties which could be included in the final system plan. In the Senate amendment the decision was to be made within 390 days after enactment in order to give the court as much information about the reorganization process as possible. The conferees decided that a decision within 180 days after the date of enactment would provide the planners with adequate time to make their planning decisions, while simultaneously providing the court sufficient information concerning the process of reorganization under this legislation. For example, before the court is required to order a railroad to proceed in reorganization pursuant to this legislation it will have the benefit of the Secretary's report on rail services in the region, the Office's public hearings and its study and evaluation of that report, and study information and preliminary planning endeavors of the Association to consider if any person tries to sustain the burden of showing that the process of reorganization pursuant to this legislation would not be fair and equitable.

While the Conference Report admirably explicates the reason for placing the district court direction for reorganization under the Act 180 days after enactment rather than the 60 days provided in the House bill or the 390 days provided in the Senate bill, it does not explain why two sets of decisions were to be required rather than one. Seemingly the House and Senate bills were simply combined with the time limits changed. However, we cannot believe that by compromising on the time periods for action by the district courts, the Conference Committee meant to authorize two sets of appeals when both the House and the Senate had been satisfied with one.

We wish it to be crystal-clear that in holding that appeals will not lie from 120-day decisions against reorganization under §77 under the first sentence of §207(b), we do not mean that matters determined in such decisions are not reviewable by this court. We mean only that review will come when an appeal is taken from the 180-day order (or non-order). Even when an appeal from an interlocutory order is authorized, failure to take such an appeal will not preclude review of a question that might then have been raised if that question is also presented by the final judgment, see 9 Moore, Federal Practice ¶110.25[2] (Ward ed. 1973). *A fortiori*, as has long been held, *Milwaukee and Minnesota R.R.* v. *Soutter*, 69 U.S. (2 Wall.) 510, 520-21 (1865), a court on appeal from a final judgment must review earlier decisions affecting the judgment that were not appealable.[4] If a district judge who has returned a negative answer to one or both of the questions put in the first sentence of §207(b) should adhere to that position, this will be the predicate for an order directing reorganization under the Act unless the judge finds that the Act does not provide a process fair and equitable to the estate. The determination of non-

reorganizability under §77 or that the public interest would not be better served by proceeding thereunder will thus be reviewable on appeals from the action or inaction by the district courts under the third and fourth sentences of §207(b).

If we entertained more doubt than we do conerning the appealability of the 120-day decisions here at issue, we would consolidate the appeals from them with those that will be taken from the 180-day orders and apply the 80-day time limit to the consolidated appeals, with the time starting to run from the appeals from the later orders. However, since we are convinced that Congress intended one but only one set of appeals from decisions of district courts under §207(b), the instant appeals are dismissed, without costs, for lack of jurisdiction.

/s/
Henry J. Friendly, U.S.C.J.

/s/
Carl McGowan, U.S.C.J.

/s/
Roszel C. Thomsen, U.S.D.J.

FOOTNOTES

1 The Government suggests that a 120-day decision that a railroad is reorganizable on an income basis within a reasonable time under §77 and that the public interest would be better served by continuing an existing proceeding under that section than by a reorganization under the Act, is appealable since such a decision, unless modified, precludes an order for reorganization under the Act pursuant to the third sentence. Decisions of this sort have been made by Judge Krupansky in the District Court for the Northern District of Ohio with respect to the Erie Lackawanna Railway Company and by Judge Murray in the District Court for Massachusetts with respect to the Boston and Maine Corporation. Since no appeals have been taken from these decisions, we have no occasion to consider the correctness of the Government's suggestion. Our opinion is limited to the appeals here before us.

2 The New Haven Trustee argues that, independently of §207(b), our jurisdiction can be sustained under §24 of the Bankruptcy Act which gives the courts of appeals "appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final . . ." Apart from the point that, although exercising appellate functions under §207(b), we are not a court of appeals as that term is used in the Judicial Code, the argument ignores the clear intention of Congress that judicial review under the Act should be as provided within its own four corners.

3 The Commonwealth of Pennsylvania makes an argument to the contrary but we see no basis for it.

4 Judge Fullam's opinion dealing with the secondary debtors in the Penn Central reorganization vividly illustrates the intertwining of the 120-day decisions and 180-day orders.